82-978

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN WAYNE TONUBBEE,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, consistent with the Fourth and Fourteenth Amendments to the United States Constitution, a request by a co-occupant of a home to accompany armed police officers into the home in order to awaken the petitioner whom he feared would be shot, can be construed as a consenual entry to effect a warrantless arrest and seizure?

2. Whether, consistent with the Fifth and Fourteenth Amendments to the United States Constitution, in a case based on circumstantial evidence, specific intent to kill or inflict great bodily harm upon more than one person may be established by photographs of the decedents who had been struck by a vehicle, no proof being offered that the fatal wounds were anything other than would have been suffered in a highway accident?

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John Wayne Tonubbee petitions for a writ of certiorari to review the judgment of the Supreme Court of Louisiana affirming his convictions under LSA R.S. 14:30 for first degree murder.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana (App. A) is reported at 420 So2d 126 (La., 1982). The 29th Judicial District Court opinion is unreported.

JURISDICTION

The judgment of the Supreme Court of Louisiana

(App. A) was entered on September 7, 1982. On October 15, 1982, the Supreme Court of Louisiana denied a petition for rehearing with one dissenting opinion issued on October 21, 1982. Jurisdiction is conferred on this Court by 28 U.S.C. §1257.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persos or things to be seized."

The Fifth Amendment of the United States Constitution provides in part:

> "Nor shall any person...be deprived of life, liberty, or property, without due process of law..."

The Fourteenth Amendment of the United States Constitution provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

[1] No other petitioner is involved in this petition.

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.....

STATEMENT OF THE CASE

John Wayne Tonubbee, an American Indian, was convicted at a jury trial on a two count indictment alleging first degree murder in violation of LSA R.S. 14:30(3).[2] He was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

On the morning of April 20, 1980, Tonubbee was rousted from his bed by five armed police officers and taken to headquarters where he was charged with two counts of second degree murder. He was later indicted for the first degree murders of Leo Dufrene and Pauline Odom who had been struck and killed by a vehicle on Highway 90 shortly before midnight on April 19, 1980.

Answers to Bills of Particulars filed by the District Attorney's Office and the Attorney General's Office which took over prosecution after the recusal of the District Attorney stated Tonubbee was arrested at his home on Bayou Gauche at approximately 6:45 or 6:49 a.m. Tonubbee shared the residence, which belonged to his employer Jack

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[2] LSA R.S. 14:30(3) provides first degree murder is the killing of a human being:

(3) when the offender has a specific intent to kill or to inflict great bodily harm on more than one person.

Allen, with Roy Stapleton. Stapelton was outside the house when the first officer arrived. He testified that when he saw the officer squat behind his unit, with a shotgun, he asked what was going on. (Volume 9, March 18, 1981, Pages 12-13).[3]

> A And he said he was lookin' for Wayne Tonubbee, and I says, "Well there's no Wayne Tonubbee here but there's a Wayne Thompson is here," and he said he says, "Well is he in the house?" And I said, "Yes, he's in the house asleep as far as I know." And he got up-tight and he was calling other officers, and I was asking him, "What's wrong? What happened?" You know, he really didn't explain that. He says, "Are there any guns in the house?" I says, "Yes," and I said, "I have a pistol in the house." He said, "Well can you go get it?" And I says, "Yeah. I can go get it." So I walked in the house and I put the pistol in my pocket.
>
> Q And then what happened?
>
> A And he was squatting down behind the car at this time with a shotgun, and I said, "Man, tell me what's going on."
>
> Q Was he the only policeman there?
>
> A He was the only one there. He had radioed for others.
>
> Q Do you know his name?

[3] Because the Clerk of Court did not use consecutive pagination in the record certified and lodged with the Louisiana Supreme Court, it is necessary to cite the volume and page number of the record.

A No. I don't. He's approximately sixty years old. I think he was grey-headed. I'm not sure.

Q Okay. Then what happened?

A Then he told me that they wanted Wayne for murder. "Well tell me," you know. I couldn't understand that. So he told me that he was in a truck and he had run over some people, and I said, "Well, I don't know about that, but let's don't go in the house and shoot the man." And so I told 'um after,—He waited until the rest of them showed up, a couple of squad cars, and I said, "Let me go in with you and wake him up," and they said, "Okay." So I went on in and I said, "Hey, Wayne,"—And all of 'um were behind me then, and—

Stapleton then accompanied the armed officers into the house and they were all present when he woke Tonubbee. All remained in the room while he dressed. It was determined by the officers that he was putting on the clothes he wore the night before and they were introduced into evidence at trial as were statements allegedly made in the police unit on the way to the Sheriff's Office. Photographs made during booking were used in photographic lineups and were introduced into evidence.

The question of the illegality based on the Fourth Amendment was raised by Motion to Suppress filed September 4, 1981. It was denied on April 23, 1981 (Appendix C). The issue was raised to the Louisiana Supreme Court by Assignment of Error #2, in petitioner's brief, oral argument and Application for Rehearing.

At the trial level and in its original brief to the Louisiana Supreme Court, the petitioner based his argument on the warrantless non-consenual entry into the home without probable cause or exigent circumstances. The Louisiana Supreme Court held (Appendix A) the police entered the house with the consent of one of its occupants, Roy Stapleton, an issue not alleged by the prosecution in the court below. Petitioner further briefed the consent issue in its Application for Rehearing.

After Tonubbee's conviction, a Motion for New Trial was filed alleging that the verdict is contrary to the law and the evidence in that no evidence was presented by the State at trial of a specific intent to kill or inflict great bodily harm upon more than one person as is required by LSA R.S. 14:30(3). The issue was again raised in petitioner's Assignments of Error Nos. 27 and 28 to the Louisiana Supreme Court, in petitioner's brief and oral argument and in the Application for Rehearing.

According to the coroner's testimony, both Odom and Dufrene died from numerous major injuries consistent with having been struck by an automobile or truck. (Volume 3, page 220).

The prosecution introduced at trial three color photographs of the body of Pauline Odom, a visitor in St. Charles Parish and six color photographs of the victim Leo Dufrene, a prominent local resident and restauranteur. The State refused a defense offer to stipulate as to the victim's

injuries and location of the bodies unless the defense also stipulated to a showing of specific intent to kill. (Volume 6, page 218). The Louisiana Supreme Court held the photographs relevant to show specific intent. *State v. Tonubbee* 420 so2d 126. No other evidence of specific intent to kill or inflict great bodily harm on Leo Dufrene is contained in the record, as is noted by Justice Watson in his dissent to the denial of rehearing. *State v. Tonubbee*, 420 So2d 126 at p. 139. The only other evidence remotely bearing on specific intent to kill Pauline Odom is a statement allegedly made by the defendant to Odom in a bar earlier the night the deaths occurred. According to a prosecution witness, Tonubbee told Odom "Either you get up and you go with me or I am going to knock your butt down and take you with me." (Volume 5, April 27, 1981, page 11).

LSA R.S. 14:30(3) requires a specific intent to kill or to inflict great bodily harm on more than one person to sustain a first degree murder conviction. The entire case was based on circumstantial evidence.

REASONS FOR GRANTING THE WRIT

The decision of the Louisiana Supreme Court should be reviewed, pursuant to Rule 17(c), because the Louisiana court found a consent to enter the house to have been given by the petitioner's housemate under conditions which were at best coercive and for this reason refused to apply *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 137 (1980).

Additionally, in a case based on circumstantial evidence, the Louisiana Supreme Court, while citing no evidence whatsoever from which specific intent could be inferred, found *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed 2d 560 (1979) to have been satisfied. The prosecution had argued before both the Louisiana Supreme Court and the trial court that photographs of the bodies of the two victims, killed by a vehicle, showed that specific intent to kill or inflict great bodily harm upon more than one person.

This Court has consistently held that absent consent or exigent circumstances, the entry of a home to conduct a warrantless search or arrest to be unreasonable under the Fourth Amendment. *Steagald v. United States*, __ U.S. __, 101 S.Ct. 1642 (1981) and *Payton v. New York*, supra.

In the instant case, the "consent" given by Roy Stapleton was at most assumed by the officers but in reality coerced. The circumstances surrounding the arrest show that the defendant was asleep, that his housemate was confronted first with one officer carrying a shotgun who was joined by four other armed officers and that he was concerned for the safety of his friend. (Volume 9 pp. 12-13 March 18, 1981).

This Court held in *Schnekloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973) at p. 227:

> "But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit

> or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the result "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."

To allow this consent, assumed, implied or coerced, to validate the arrest of the defendant, in a factual situation in which the *Payton* decision would clearly apply is to create an exception to *Payton* not supported by other opinions of this Court.

As to the question of sufficiency of evidence of specific intent to kill or inflict great bodily harm on more than one person, as required to support a first degree murder conviction under Louisiana law, *Jackson v. Virginia*, supra, places the burden of proving specific intent beyond a reasonable doubt on the prosecution. The prosecution contended that photographs of the victims showed specific intent.

The coroner testified that the injuries which caused the deaths of both victims were consistent with having been struck by an automobile or truck. (Volume 3 p. 220).

In his dissenting opinion from the denial of a rehearing before the Louisiana Supreme Court, Justice Watson stated:

> "The facts appear as compatible with negligent homicide as first degree murder, especially as to

Dufrene. The record, while somewhat sketchy as to defendant's implication in Odom's death, is almost entirely silent as to the circumstances of Dufrene's; about the only indication is that Dufrene was hit by the pickup truck, which certainly falls far short of proving an intentional killing, beyond a reasonable doubt. The facts should be re-examined."

The Due Process Clause requires no less.

CONCLUSION

John Wayne Tonubbee was arrested without a warrant, with entry into his home made by the officers based on the coerced consent of co-occupant of the home and was convicted of first degree murder under a statute requiring the specific intent to kill or inflict great bodily harm on more than one person with only photographs which showed injuries to the victims consistent with negligent homicide to show specific intent. We urge the Court to grant the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the Petition for Writ of Certiorari have been served upon the United States of America by placing three copies thereof in the United States Mail, postage prepaid, addressed to The Honorable William J. Guste, Jr., Attorney General, State of Louisiana, 1885 Wooddale Blvd., Baton Rouge, La. 70806. I further certify that all parties required to be served have been served.

New Orleans, Louisiana, this_____day of December, 1982.

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APPENDIX "A"

STATE of Louisiana

v.

John Wayne TONUBBEE.

No. 81-KA-2643

Supreme Court of Louisiana

Sept. 7, 1982

Rehearing Denied Oct. 15, 1982

Dissenting from Denial of Rehearing Oct. 21, 1982

Defendant was convicted in the Twenty-Ninth Judicial District Court, Parish of St. Charles, Ruche J. Marino, J., of first-degree murder, and he appealed. The Supreme Court, Dixon, C.J., held that: (1) defendant was not improperly arrested in his home without a warrant; (2) trial court did not err in denying motion to suppress photograph lineup identification; (3) defendant was not denied speedy trial; (4) evidence was sufficient to support conviction; and (5) trial court did not err in requiring defense to submit assignments of error before trial transcript was prepared.

Affirmed.

Watson, J., would grant a rehearing and assigned

written reasons.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Patrick G. Quinlan, Asst. Attys. Gen., Harry F. Morel, Jr., Dist. Atty., Abbott J. Reeves, Asst. Dist. Atty., Julie E. Cullen, Asst. Atty. Gen., Baton Rouge, for plaintiff-appellee.

Victor E. Bradley, Jr., Norco, Harriette R. Merrell, Slidell, for defendant-appellant.

DIXON, Chief Justice.*

Defendant John Wayne Tonubbee was charged by grand jury indictment with two counts of first degree murder (R.S. 14:30). Following a trial by jury, defendant was found guilty as charged and was sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. It is from this conviction and sentence which defendant appeals, urging thirty-one assignments of error.[1]

On April 19, 1980, between 11:10 and 11:33 p.m., Pauline Odom and Leo Dufrene were struck and killed by a

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* Judges Charles R. Ward, William H. Byrnes, III and David R. M. Williams of the Court of Appeal, Fourth Circuit, participated in this decision as Associate Justices pro tempore, joined by Chief Justice Dixon and Associate Justices Marcus, Blanche and Lemmon.

[1] Assignments of Error Nos. 4, 5, 8, 23 and 26 were specifically abandoned and waived in brief by defense counsel.

vehicle on Highway 90 near Paradis, Louisiana. The St. Charles Parish Sheriff's Office had received a call regarding a body lying on the side of the road. The investigating officer discovered Pauline Odom fatally injured near a light blue automobile. Shortly thereafter, Scott Perret and Paul Templet arrived at the scene. It was learned that the two young men had stopped to aid Odom whom they had seen stumbling across the highway, apparently drunk. Templet remained with the woman while Perret drove off to phone for assistance. According to Templet, a middle-aged man later identified as Leo Dufrene stopped to assist. Templet stated that he was kneeling on the ground holding Odom's head while Dufrene was standing in front of him. Hearing footsteps behind him, Templet turned around and glimpsed a dark complexioned, mustached man wearing dark clothes before he was hit on the head and rendered semiconscious. When Perret returned, he found Templet staggering down the highway with a gash on his head. The two men returned to the scene and found the police already there.

Further investigation revealed that on the night of her death Ms. Odom had been drinking at Blondy's Lounge, where she was eventually refused service due to her drunken condition. A customer at the bar testified that Odom had talked casually with the defendant before reluctantly leaving the premises with him around 11:00 p.m.

The police officers then proceeded to defendant's residence. The house was located in a camp owned by de-

fendant's employer; defendant shared the house with Roy Stapleton. Stapleton escorted the officers into the house and led them into defendant's bedroom where defendant was found asleep. The officers handed the defendant his clothes and defendant accompanied them to headquarters.

Meanwhile, Roy Stapleton's truck was located abandoned behind a lounge a block off the highway. Defendant had borrowed the truck on the day in question. The front grill and bumper were damaged. Blood, hair and body tissue were spotted on the front of the truck and a man's shirt was twisted around the drive shaft. The blood samples were later matched with the victims' blood and the shirt was later identified as belonging to Leo Dufrene.

The blue car parked next to Odom's body had been identified as belonging to Dufrene, but Dufrene could not be located. Finally, at dawn on April 20, 1980, Dufrene's body was discovered on the median of the highway 120 feet from the location of Odom's body.

Defendant was indicted by the grand jury for first degree murder. The prosecution was subsequently quashed because the district attorney was related to one of the victims. The attorney general's office then took charge of the case and presented it to the grand jury a second time. A second indictment was returned. On May 5, 1981, defendant was convicted of two counts of first degree murder and was sentenced the following day to life imprisonment without benefit of parole, probation or suspension of sentence.

Assignments of Error Nos. 2, 9 and 10

[1] By these assignments defendant contends that he was arrested in his home without a warrant in violation of the Fourth Amendment of the United States Constitution and Art. 1, § 5 of the Louisiana Constitution of 1974. Defendant asserts that the warrantless arrest was made without probable cause, and without exigent circumstances for the intrusion of a constitutionally protected area, and, therefore, all evidence seized as a result of this arrest should be suppressed under the "fruit of the poisonous tree" doctrine. See *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Detective Bolling, the arresting officer, stated that he did not procure an arrest warrant for defendant before going to the house because he just wanted to question him. He stated that defendant was not placed under arrest until sometime later at the sheriff's station, after Leo Dufrene's body and the truck were found.

The detective's story was corroborated by Officer Boudreaux and Roy Stapleton. Stapleton testified that he resided with defendant in a camp owned by Jack Allen, defendant's employer. When the detectives arrived, Stapleton was across the road on his houseboat. He informed the detectives that defendant was sleeping in the house. Stapleton was asked to remove any guns from the house, which he did. He then gave the detectives permission to enter the house and led them to defendant's bedroom. Ap-

proximately five policemen stood around the bed while Stapleton awakened defendant.

When defendant sat upright on the bed the police told him to get dressed to come to headquarters in Hahnville for questioning. One of the police officers handed defendant his pants. While defendant was dressing it was determined that he was putting on the same clothes that he had worn the previous night. Stapleton stated that his truck was mentioned and defendant, who had used it the day before, did not know where it was or where the keys were.

It is clear that the detectives entered the house with the consent of one of its occupants. The testimony of all of the witnesses to this confrontation established that defendant was asked to accompany them to headquarters for questioning. Defendant did not decline the request or otherwise voice his disapproval. Under the circumstances, there is no reason to believe that defendant's action was not voluntary.

These assignments lack merit.

Assignments of Error Nos. 1 and 13

By these assignments defendant contends that the trial court erred in denying his motion to suppress the photographic lineup identification. The basis for the motion is the assertion that the lineup was suggestive and the

chain of evidence was not maintained.

The record shows that Paul Templet chose defendant's picture during the photographic lineup. Templet testified that he was given a stack of seven photographs. The man in each photograph had similar physical characteristics and was pictured with a mustache and either black or dark brown hair. Templet stated that he looked through the stack three or four times before making the selection and no suggestion or indication was made with regard to the picture he should choose. He also stated that he signed his name on the back of the picture he chose.

[2] This court has previously held that there are "[n]o exact detailed criteria for a legitimate photographic lineup....[T]he fundamental rule is that each case must be considered on a careful analysis of its own facts...." *State v. Morgan*, 367 So.2d 779, 783 (La.1979). An analysis of the facts in the instant case indicates that particular care was displayed by the police officers in selecting photographs of men with physical characteristics very similar to those of defendant. In fact, the trial judge commented while viewing the pictures that "all of the pictures look alike...to the extent that those people could be look alikes." The trial court properly denied the motion to suppress.

[3] Defendant's argument with respect to the "integrity" of the chain of custody is without merit. Detective Bolling testified that the photographs remained in his custody at all times. Additionally, Templet testified that

he chose defendant's photograph during the photographic lineup and he identified his signature on the back of it. It is undisputed that the photograph chosen by Templet was the same one admitted into evidence.

These assignments lack merit.

Assignment of Error No. 3

[4] By this assignment defendant contends that he was denied a speedy trial.

Defendant was indicted by the grand jury on May 2, 1980 following his arrest on April 20, 1980. Pursuant to a motion for a speedy trial signed by the trial court on September 3, 1980, a trial date was set for October 28, 1980. On September 10, 1980, however, the District Attorney of St. Charles Parish recused himself on the ground that he was related to one of the victims, Leo Dufrene. Defendant filed a motion to quash the original indictment, which motion was sustained by the court on September 30, 1980. Defendant remained in custody until October 23, 1980 when the court ruled at a preliminary examination that there was no probable cause to hold him. A new grand jury was subsequently empaneled under the direction of the attorney general's office and defendant was indicted a second time. Following a series of motions the trial date was set for April 21, 1981. Defendant did not file a motion for a speedy trial subsequent to the second indictment.

The length of delay between defendant's original arrest and the beginning of the trial was one year. Following the filing of defendant's motion for a speedy trial on the first indictment, a trial date was set for less than two months later. However, pursuant to defendant's subsequent motion to quash, the entire prosecution was dismissed. Despite the fact that defendant did not request a speedy trial following the second indictment, the trial began four months later. Moreover, defendant does not assert that his ability to adequately prepare his defense was impaired or that defense witnesses or evidence had become unavailable due to the delay. See *State v. Dewey*, 408 So.2d 1255 (La.1982).

Defendant argues that the delay was occasioned by the district attorney's failure to recuse himself until four and one-half months after defendant's arrest. However, the district attorney recused himself pursuant to defendant's motion and defendant does not maintain that the district attorney acted in bad faith. Furthermore, at the time the district attorney was recused, a trial date had already been set. Defendant could have proceeded to trial on that date, but chose to have the indictment quashed; he made no speedy trial request subsequent to the second indictment.

Considering these factors, especially the fact that no prejudice has been shown, the defendant was not deprived of his constitutional right to a speedy trial.

This assignment lacks merit.

Assignment of Error No. 6

By this assignment defendant contends that the trial judge erred in not ordering a recess to allow defense counsel to thoroughly examine Detective Bolling's entire file to make notations and copies as might be required.

Detective Bolling was testifying at the preliminary hearing on October 23, 1980 about statements made to him by Tina Robinson regarding her whereabouts on the night of the homicides. Tina Robinson had previously given a formal written statement from which Bolling read as he testified. During cross-examination defense counsel requested that he be allowed to examine the contents of the detective's folder and requested a recess in order to do so. Defense counsel was permitted to view the contents of the folder for a short period of time in court while cross-examining the witness, but the recess was not granted. Defendant claims that under this court's ruling in *State v. Valentine*, 375 So.2d 1378 (La.1979), the court should have ordered the recess to allow him to thoroughly examine the document in order to intelligently examine the witness.

In *Valentine*, the trial judge refused to permit defense counsel to examine the notes from which a prosecution witness was testifying. In this case, however, defense counsel was permitted to view the notes from which the prosecution witness was testifying. Nevertheless, defense counsel asserts that the trial court should have granted a recess to permit him to copy and make notations from the

notes, an issue that was not addressed in *Valentine*.

[5] Whether to grant or deny a recess is a matter within the sound discretion of the trial court, and its ruling with respect thereto will not be disturbed absent a showing of abuse of discretion and a showing of specific prejudice resulting therefrom. See *State v. Telford*, 384 So.2d 347 (La.1980); *State v. Bertrand*, 381 So.2d 489 (La.1980); *State v. Gordy*, 380 So.2d 1347 (La.1980).

[6] The record reflects that the parties had been allowed complete discovery prior to trial. Counsel for both parties and the trial judge agreed that everything in the state's case file had been subject to discovery by the defense, including all police reports and statements by witnesses. Defense counsel does not claim that he was denied access to the statement during discovery. Therefore, the trial judge did not abuse his discretion in refusing to grant the recess.

This assignment lacks merit.

Assignment of Error No. 7

[7] By this assignment defendant contends that the trial court erred in ordering him to furnish the state a copy of defendant's polygraph examination.

The trial court granted defendant's motion for funds to pay for a private polygraph examination of defendant.

Subsequent to the examination, the state filed a motion, based on C.Cr.P. 725, requesting the results of this test. The trial court ordered defendant to provide the state with the results, which defendant did on April 21, 1981. Defendant asserts, however, that the order was improper, inasmuch as the results of a polygraph test are inadmissible at trial, and so were never intended for use at trial. Defendant argues that discovery of the polygraph tests is not justified by either C.Cr.P. 725[2] or C.Cr.P. 728.[3] Polygraph examinations are generally regarded as a type of scientific evidence. *State v. Catanese*, 368 So.2d 975 (La.1979). Since C.Cr.P. 728 specifically exempts scientific reports from its requirements, C.Cr.P. 725 governs the admissibility of polygraph examination results.

In ordering defendant to provide the state with the results of the examination, the trial judge stated that as he

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[2] "When the court grants the relief sought by the defendant under Article 719 it shall, upon the motion of the state, condition its order by requiring that the defendant permit or authorize the state to inspect and copy, photograph or otherwise reproduce any results of reports, or copies thereof, of physical and mental examinations and of scientific tests or experiments, of a similar nature, made in connection with the case, that are in the possession, custody, or control of the defendant, and that the defendant intends to use as evidence at the trial or were prepared by a witness whom the defendant intends to call at the trial when such results or reports relate to his testimony." C.Cr.P. 725.

[3] "Except as to scientific or medical reports, this Chapter does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation or defense of the case; or of statements made by the defendant, or by witnesses or prospective witnesses to the defendant, his agents or attorneys; or of the names of defense witnesses or prospective defense witnesses." C.Cr.P. 728.

remembered it, there was an agreement that if state funds were going to be used, the test results would be made available to both sides. Such an agreement, however, is not substantiated by the record.

If the defendant, under C.Cr.P. 719, is allowed to copy reports of scientific tests in possession of the district attorney and intended for use at trial, C.Cr.P. 725 permits the state to inspect or copy reports of similar scientific tests or experiments in the defendant's possession intended for use at trial. The results of a polygraph examination are inadmissible in Louisiana when offered at a criminal trial by either party, either as substantive evidence or as relating to the credibility of a party or witness. *State v. Davis,* 407 So.2d 702 (La.1981); *State v. Catanese, supra.* Since the results could not be referred to at trial, the trial court erred in ordering defense counsel to provide the state with the results of the examination. However, such an error does not necessarily constitute reversible error. "A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect *substantial* rights of the accused." C.Cr.P. 921 (emphasis added).

The results of the polygraph examination were never introduced into evidence and no reference was made to the fact that the lie detector test was given. Defense counsel failed to show any prejudice that may have resulted from the state's inspection of the test findings. Therefore, any error that might have occurred here was harmless inas-

much as it did not affect a "substantial right of the accused."

Assignment of Error No. 11

[8] By this assignment defendant contends that the trial court erred in allowing the St. Charles Parish Sheriff to sit at the counsel table during voir dire.

The prosecution in this case was handled by the office of the attorney general, as the district attorney was recused. During voir dire the trial judge allowed the sheriff to sit with the prosecutors to assist by providing relevant information concerning the parish.

Defendant asserts that his trial was prejudiced by the presence of the sheriff, with his badge on, at the counsel table. However, this court has never held that such actions necessarily prejudice a defendant's trial. Defendant cites no statutory authority for his position, nor does he show any specific prejudice that resulted from the sheriff's presence at the counsel table.

This assignment lacks merit.

Assignments of Error Nos. 12 and 14

By these assignments defendant argues that the trial judge erred in admitting gruesome photographs of the victim since their probative value did not outweigh the

possible prejudice to the jury. *State v. Matthews*, 354 So.2d 552 (La.1978).

Defendant points out that the state refused his offer to stipulate as to the victims' injuries and the location of the bodies unless defendant would likewise stipulate that the photographs showed his specific intent to kill. Defendant maintains that the injuries sustained were consistent with injuries suffered in any vehicular homicide, and, therefore, these photographs were not relevant to show specific intent.

The photographs which defendant objects to are:

SE—# 3—upper half of Odom by car

SE—# 4—full body by car, Odom

SE—# 5—upper half of Odom by car

SE—# 15—full body, Dufrene

SE—# 16—full body, Dufrene

SE—# 17—face and shoulders, Dufrene

SE—# 18—back and head, Dufrene

SE—# 19—face, Dufrene

Defendant contends that the graphic color and the repetitiveness of the photographs encouraged the jurors to overemphasize prejudicial material with little evidentiary value.

[9] A trial court's ruling with respect to the admissibility of allegedly gruesome photographs will only be disturbed if the prejudicial effect of the photographs clearly outweighs their probative value. *State v. Landry*, 388 So.2d 699 (La.1980), cert. denied, 450 U.S. 968, 101 S.Ct. 1487, 67 L.Ed.2d 618 (1981):

> "...In weighing the relative probative value of proffered evidence against its probable prejudicial effect, whether the evidence is merely cumulative is a factor to be considered...." *State v. Manieri*, 378 So.2d 931, 933 (La.1979).

In the instant case two of the photographs depicting the body of Pauline Odom are virtually identical. No legitimate purpose can be attributed to the introduction of the second photograph.

[10] The state maintains that it introduced the photographs to pinpoint the location of the bodies, the extent and nature of the injuries and the clothing worn by the victims in order to link them with Stapleton's truck and to corroborate other evidence. Although the photographs were unpleasant and distasteful, the state argues that they were not so gruesome as to inflame the jury against the defendant. *State v. Vernon*, 385 So.2d 200 (La.1980).

Even though distasteful, these photographs were held to be relevant, having a probative value which outweighed any possible prejudicial effect on the jury when they were offered to prove the injuries, to corrobo-

rate other evidence indicating the manner of death and to identify the victims. *State v. Motton*, 395 So.2d 1337 (La.1981), cert. denied, 454 U.S. 850, 102 S.Ct. 289, 70 L.Ed.2d 139 (1981); *State v. Vernon*, supra.

In regard to defendant's argument that his offer to stipulate as to the contents of the gruesome photographs was refused, this court held in *State v. Bodley*, 394 So.2d 584, 591 (La.1981):

> "... While the existence of an offered stipulation necessarily bears upon a balancing of the probative value of the photographs against their prejudicial effect, the decision nevertheless remains one for the trial court...."

The existence of the stipulation together with the introduction of the two virtually identical photographs are additional factors to be considered in balancing the probative value of the evidence against any possible prejudicial effects. *State v. Manieri*, supra. Since the photographs were relevant to show intent to kill or inflict great bodily harm—an issue not stipulated to by the defendant—and since the cumulative effect of the two duplicate photographs was not clearly inflammatory, the trial judge did not clearly abuse his discretion in concluding that the probative value overcame any possible prejudicial effects. *State v. Landry*, supra; *State v. Sawyer*, 350 So.2d 611 (La.1977).

These assignments lack merit.

Assignments of Error Nos. 15, 16, 17, 18, 19, 20, 21 and 22

[11] By these assignments defendant contends that the trial court erred in admitting various items of physical evidence without the proper foundation. The defendant claims that the chain of custody was not properly established for the introduction of these items since they were obtained and handled by many different people.

The test for admissibility of demonstrative evidence was described in *State v. Paster,* 373 So.2d 170, 177 (La.1979):

> "To admit demonstrative evidence at trial, the law requires that the object be identified. The identification can be visual, that is, by testimony at the trial that the object exhibited is the one related to the case. It can also be identified by chain of custody, that is, by establishing the custody of the object from the time it was seized to the time it was offered in evidence. For the admission of demonstrative evidence, it suffices if the foundation laid establishes that it is more probable than not that the object is relevant to the case. Lack of positive identification goes to the weight of the evidence rather than to its admissibility. Ultimately, connexity is a factual matter for determination by the trier of fact. *State v. Drew,* 360 So.2d 500 (La.1978)."

A review of the record in the instant case shows that all items of evidence in question were relevant to issues at trial and were identified, both directly and by chain of custody, in such a manner as to establish their connexity

to the case.[4] The investigating officers testified as to their involvement with each piece of evidence admitted and as to the procedures established to maintain security of the evidence. It is true a possibility exists that one of the participating criminologists misplaced a piece of cloth with blood-like samples taken from one of the bottles since two cloths were placed in the vial and only one remained to be tested. In addition, a shoe was moved at the crime scene before the crime scene technician arrived. The law, however, does not require the foundation to negate every possibility of tampering. *State v. Dotson*, 260 La. 471, 256 So.2d 594 (1971), cert. denied, 409 U.S. 913, 93 S.Ct. 242, 34 L.Ed.2d 173 (1972). The exhibits introduced were connected with the case. *State v. Paster*, supra. Any deficiencies in the chain of custody were properly attributable to the weight, rather than to the admissibility of the evidence.

These assignments lack merit.

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[4] Chain of custody or identification objections were lodged against the following items of evidence: S-38, black blouse; S-39, tan slacks; S-40-41, pair of brown boots, all identified by Ted Stevens, technician assigned to the crime scene; S-42-43, known hair samples identified by Stevens and Steve Kirby, a Jefferson Parish crime lab person; S-51-53, blood-like samples identified by Stevens and Kirby; S-54, lug wrench identified by Stevens; S-55, piece of pipe identified by Stevens; S-56, GMC label identified by Stevens; S-57, plastic grill identified by Stevens; S-58, navy blue cap; S-59, gray shoe; S-60, light tan men's slacks; S-61, plaid men's shirt, all identified by Stevens; S-70-79, photographs of exhibits, identified by Ronald Singer, Director of Jefferson Parish Sheriff's Office Crime Lab; S-80-82, paint scrapings identified by Singer; S-83, S-87, debris scrapings from exhibits identified by Singer; S-88, gray plastic fragments identified by Singer.

Assignment of Error No. 24

[12] By this assignment defendant contends that the trial court erred in admitting a diagram of the crime scene made as part of the police record.

The diagram depicted the location of the two bodies and the probable path of the vehicle as adduced from the physical evidence at the crime scene. Defendant asserts that the diagram is irrelevant.

This court in *State v. Prestride,* 399 So.2d 564 (La.1981), held that diagrams are admissible to aid the jury in understanding testimony if they are a reasonable visual demonstration of the events which the witnesses are relating. The accuracy of the diagram herein was attested to by Deputy Curtis Scott and State Trooper Jimmy Mahan, who were both present at the crime scene at various times (the two men drew the diagram). Even though Odom's body and Dufrene's automobile had been removed by the time Mahan arrived at the scene, Deputy Scott was present prior to the transfer of the body and vehicle from their original location. Since the diagram appears to be relevant and there is no evidence to refute its accuracy, we find no error in the trial judge's ruling.

This assignment lacks merit.

Assignment of Error No. 25

By this assignment defendant contends that the trial court erred in admitting hearsay statements of defendant that were made to state witness Billy Ray Reno.

Pauline Odom was seated in Blondy's Lounge next to Billy Ray Reno and defendant about 10:30 p.m. (approximately one hour before her death). Reno testified that Ms. Odom had been "cut off" from alcoholic beverages at the bar because of her drunkenness and that defendant attempted to get her to leave with him. He declared that Odom stated to him: "I don't want to leave here. I don't want any trouble. I love this place around here. I only want to be happy." Reno explained further that defendant responded to Odom: "If they want to party here all night, let them party here all night but we're goin'. Either you come along with me or I'm gonna knock your butt off and take you out." Reno later saw defendant and Odom walk out of the door together.

[13,14] This court has adopted Professor McCormick's definition of hearsay evidence:

> " '...testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.' " (citation omitted). *State v. Martin*, 356 So.2d 1370, 1373-74 (La.1978).

In this case it is clear that Reno's testimony regarding Odom's statements was not hearsay since the out-of-court statement was offered as circumstantial proof of the victim's state of mind prior to the homicide. *State v. Raymond*, 258 La. 1, 245 So.2d 335 (La.1971), appeal dismissed, *Ramos v. Louisiana*, 404 U.S. 805, 92 S.Ct. 101, 30 L.Ed.2d 38 (1971). Evidence of her fear of defendant or her emotional reaction to his presence is relevant to show that contact between the victim and defendant occurred. *State v. Raymond*, supra. Admission of the out-of-court declaration of the victim is premised upon the expedient rule that "...conduct or declarations of the decedent shortly before [her] killing may sometimes be admissible as tending to show immediately antecedent circumstances explanatory of the killing and tending to connect the accused with it.... *State v. Raymond*, supra 245 So.2d at 342 (concurring opinion)." *State v. Weedon*, 342 So.2d 642, 646 (La.1977). Odom's statements to Reno are admissible as circumstantial evidence of her state of mind concerning the defendant less than an hour before her death.

Reno also testified as to defendant's conversation with Odom. At trial Reno recalled the defendant taelling Odom: "Either you come along with me or I'm gonna knock your butt off and take you out."[5] This statement to the victim constitutes a threat.

[15] Reno's testimony about defendant's conversa-

[5] However, Reno's written statement shortly after the incident recounts the utterance as: "If you don't come on and go, I will knock the hell out of you."

tion does not qualify as hearsay because it was not introduced to prove the truth of the matters asserted. "...Rather, the conversation is admissible to show that it occurred...." *State v. Boyd*, 359 So.2d 931, 938 (La.1978). Evidence of previous quarrels between the defendant and the victim or of previous threats made by the defendant to the victim has previously been held admissible to attest to the intent of defendant to commit a crime in a case where he denies that he is the perpetrator. *State v. Leming*, 217 La. 257, 46 So.2d 262 (1950); *State v. Winstead*, 204 La. 366, 15 So.2d 793 (1943). In prosecutions for murder, proof of prior difficulties and of threats made by defendant against the victim are admissible. *State v. Morris*, 397 So.2d 1237 (La.1980); *State v. Thibeaux*, 366 So.2d 1314 (La.1978); *State v. Sharp*, 174 La. 860, 141 So. 859 (1932); *State v. Davis*, 154 La. 295, 97 So. 449 (1923). Thus the threatening statements made by defendant to the victim are admissible to establish a motive or the intent of the defendant to harm the victim. *State v. Leming*, supra.

This assignment lacks merit.

Assignments of Error Nos. 27 and 28

[16] By these assignments defendant contends that the trial court erred in denying his motion for a new trial.

The basis for defendant's motion was that the evi- was insufficient to support a finding of specific intent to kill or inflict great bodily harm upon more than one person.

Several witnesses testified that on the night that Pauline Odom was killed, she and defendant were drinking together in Blondy's, and that she left the bar with defendant only after being threatened by him: "Either you come along with me or I'm gonna knock your butt off and take you out." The testimony established that the two left the bar together around 11:00 p.m.

Paul Templet testified that shortly after 11:00 p.m. he saw Odom alive, staggering across the highway, and he stopped to assist her. He stated that he was kneeling over Odom, and Leo Dufrene (who also had stopped to assist) was standing in front of him when he heard footsteps from behind. He looked up and saw a dark complexioned man with a mustache, dressed in dark clothes, whom he later identified as defendant in a photographic lineup. He was then hit over the head and rendered semiconscious.

The evidence also reveals that Odom and Dufrene were struck and killed by a truck belonging to Roy Stapleton, the man with whom defendant was living. Stapleton stated that defendant was using the truck the day Odom and Dufrene were killed. Finally, a state witness testified that he saw defendant driving the truck as late as 6:00 p.m. on the day in question.

In addition, the experts testified that the shirt defendant wore that night was stained with human blood.

Defendant's version of the facts is that he left the

camp in Stapleton's truck about 9:00 a.m. to cash his paycheck. After he got the check cashed later that morning, he started drinking at Slim's about 2:00 p.m., leaving the truck in Slim's parking lot at this time. About 4:30 p.m. he walked to Blondy's where he met Pauline Odom for the first time and bought her a "beer or two." Odom left shortly thereafter but defendant stayed at Blondy's until around 8:00 p.m. As he walked out of Blondy's on his way back to Slim's, defendant met a "friend" named Jim, to whom he loaned Stapleton's truck. Jim was an acquaintance with whom defendant had spoken casually on several occasions. Defendant did not know Jim's last name or where he was employed, and Jim was never located. Defendant testified that he spent the rest of the evening, until about 11:00 p.m., in Blondy's where he witnessed the fight between Pauline Odom and her boyfriend Eddie Legg, prior to Legg's leaving the bar. After Legg left, Odom drifted over to the bar and talked to defendant for about twenty minutes. Defendant stated that he then went to the restroom and left Blondy's by the back door in order to avoid any trouble with Odom and her boyfriend Legg.

Defendant stated that since Jim had not returned with the truck, he first wandered over to Mike's Place and ordered a drink. He then hitched a ride with an unknown person to J. & D.'s Bar, where he called Juanita Dufrene, his girl friend. Juanita arrived at J. & D.'s and they socialized until about 1:00 a.m. before leaving to eat at Captain Leo's Restaurant. Juanita drove defendant back to the camp about 2:00 or 2:30 a.m. Defendant denies driving the

truck after about 2:00 p.m., when he parked it at Slim's Bar. He denies leaving the bar with Odom and he also denies making any statement while riding to police headquarters.

The evidence contradicts defendant's testimony and leads to the conclusion that defendant and Odom left the bar together in the borrowed red and white truck. Whether defendant was driving the truck when it struck the victims, and whether he had specific intent to kill or inflict great bodily harm on them, are determinations deduced from the established facts of the case.

Defendant had possession of the truck which mangled Dufrene's body. He talked with an intoxicated, flirtatious Odom in a bar, and they were both denied service by the bartenders. He failed to convince Odom to leave with him until he threatened her. Defendant and Odom left together at 11:00 p.m. At about ten minutes after 11:00 p.m. Templet and Perret stopped on the highway not far from Blondy's to assist Odom, drunk but as yet unharmed. Perret went to telephone. Dufrene joined Templet, and Templet was struck from behind by a dark complexioned attacker.

Templet's identification of defendant was not certain because of the darkness and the swiftness of the unexpected attack. Nevertheless, the description he gave resembled Tonubbee, whose photograph he selected in the lineup. Always admitting the possibility of error, Templet's identi-

fication of Tonubbee was consistent and convincing to the jury.

Ten or fifteen minutes after the killings, defendant wandered into a barroom a short distance down the road. His damaged truck, with flesh, hair and clothing clinging to it from the collision with the victims, was found a block and a half off the highway behind the barroom.

Wreckage from defendant's truck was recovered from the death scene and human blood was found on his shirt.

The Louisiana rule as to circumstantial evidence is:

> "...assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." R.S. 15:438

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires, to support a conviction, that the evidence be sufficient to convince any rational trier of fact of defendant's guilt, viewing the evidence in the light most favorable to the prosecution.

Both rules are satisfied in this case. Every reasonable hypothesis of defendant's innocence is excluded by the facts which the evidence tends to prove. No contrary hypothesis is consistent with the evidence. The evidence is sufficient to convince a rational fact finder,

viewing the evidence in the light most favorable to the prosecution, of defendant's guilt.

These assignments lack merit.

Assignment of Error No. 29

Defendant contends that his trial was prejudiced by the four and one-half day recess ordered by the trial court when the state applied for supervisory writs to this court.

Defendant did not raise his objection to the recess in the trial court until he moved for a new trial. He could have registered his objection either when the recess was granted or when the trial resumed at the end of the recess. See C.Cr.P. 708, Comment (b).

The record reveals that during cross-examination of the defendant, the prosecutor attempted to impeach him with a prior inconsistent statement made during a pre-test interview with the polygraph administrator. The judge refused to allow any questioning by the state that in any way related to the polygraph test administered to defendant. Nevertheless, he recessed the trial on Wednesday morning until the following Monday morning to allow the state time to apply for writs to this court. The writ request was denied and the trial commenced the following Monday, four and one-half days later.

[17,18] To impeach the credibility of the defendant,

the state has to lay the foundation required by R.S. 15:493, which states:

> "Whenever the credibility of a witness is to be impeached by proof of any statement made by him contradictory to his testimony, he must first be asked whether he has made such statement, *and his attention must be called to the time, place and circumstances, and to the person to whom the alleged statement was made,* in order that the witness may have an opportunity of explaining that which is prima facie contradictory. If the witness does not distinctly admit making such statement, evidence that he did make it is admissible." (Emphasis added).

Accordingly, an inquiry about the circumstances under which the prior inconsistent statement was made would have been necessary. The statement occurred during the pre-test interview with the polygraph tester. The existence of a polygraph examination cannot be referred to in a criminal trial to bear upon the credibility of the defendant. *State v. Davis,* 407 So.2d 702 (La.1981); *State v. Catanese,* supra. The end result of laying the proper foundation would be to put the jury on notice that a polygraph examination had been administered to the defendant. this is impermissible.

[19] Since this attempted cross-examination of defendant would have led necessarily to inadmissible testimony, the trial judge properly refused to allow the state to pursue this line of questioning. However, the judge also granted the state a recess to apply for writs on this issue. The grant

or denial of a recess is largely within the discretion of the trial court. *State v. Bertrand*, supra; *State v. Charles*, 350 So.2d 595 (La.1977); *State v. Sharp*, 321 So.2d 331 (La.1975); *State v. Richmond*, 284 So.2d 317 (La.1973). An appellate court will not overturn the trial judge's decision absent a clear abuse of discretion. *State v. Bertrand*, supra; *State v. Robertson*, 358 So.2d 931 (La.1978); *State v. Jenkins*, 340 So.2d 157 (La.1976).

The four and one-half day delay occurred at a critical time in the first degree murder trial when defendant was under cross-examination. A considerable time break in the midst of defendant's testimony could prejudice the jury's verdict. In the instant case the sequestered jury could only speculate as to the reasons for the substantial delay.

[20] This court denied the state's writ request, recognizing that the application lacked merit. A recess should not have been granted by the trial judge on his own motion since the possibility of prejudice clearly outweighed the merits of the state's claims. However, the defendant failed to make a timely objection to the judge's action. An accused's right to have a particular trial action reviewed on appeal may be waived by the failure of his counsel to object to it at the time made:

> "...the failure of an accused's counsel to make such objection or to file such motions will ordinarily constitute an intelligent waiver of the right to appellate review of such types of errors and the evidence upon which they are based...." *State v. Spain*, 329 So.2d 178, 179 (La.1976).

By failing to seek corrective measures or to make a timely objection, defendant waived his right to contest the granting of the four and one-half day recess. C.Cr.P. 841; *State v. Clark*, 332 so.2d 236 (La.1976); *State v. Marcell*, 320 So.2d 195 (La.1975).

This assignment lacks merit.

Assignment of Error No. 30

[21] By this assignment defendant contends that the trial court erred in requiring the defense to submit assignments of error before the trial transcript was prepared.

Defendant asserts that the court reporters were granted extensions of time in which to file the transcript of the trial, although defense counsel was denied an extension of time in which to file assignments of error. The result, defendant states, is assignments of error that are not as precise or as accurate as they should be.

Defendant was not without a remedy in ensuring that his assignments of error were precise or accurate. He had the option of either refining the assignments of error through his brief or of applying for writs to this court to be allowed to file supplemental assignments of error. Upon a showing of prejudice to the appeal, this court permits supplemental assignments of error. Defendant failed to avail himself of the remedies available to him. Moreover, he does

not make a showing of specific prejudice resulting from the trial court's ruling.

This assignment lacks merit.

Assignment of Error No. 31

By this assignment defendant requests that this court review any and all errors patent on the face of the record. We found no errors that would warrant a reversal of defendant's conviction.

For these reasons, defendant's conviction and sentence are affirmed.

LEMMON, J., concurs.

WATSON, Justice, dissenting from denial of rehearing.

The defense contends that specific intent to kill or inflict great bodily harm on more than one person was not proved. The opinion relies, in part, on questionable facts to reject the defense argument. Particularly, the opinion states that blood on the front of the truck matched that of the victims. The blood was *not* matched with the victims'. (See testimony of Stephen Kirby, Jefferson Parish Crime Lab.)

This case is based on circumstantial evidence, and all

reasonable hypotheses of innocence must be negated.

The facts appear as compatible with negligent homicide as first degree murder, especially as to Dufrene. The record, while somewhat sketchy as to defendant's implication in Odom's death, is almost entirely silent as to the circumstances of Dufrene's; about the only indication is that Dufrene was hit by the pickup truck, which certainly falls far short of proving an intentional killing, beyond a reasonable doubt. The facts should be re-examined.

Also, there is a substantial issue under *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2 and 639 (1980) concerning defendant's warrantless arrest.

For these reasons, a rehearing should be granted.

APPENDIX "B"

STATE OF LOUISIANA NOS. 80-143 & 80-151; "C"

VERSUS 29TH JUDICIAL DISTRICT COURT

JOHN WAYNE TONUBBEE PARISH OF ST. CHARLES

STATE OF LOUISIANA

FILED: May 26, 1981 DEP. CLERK_____

JUDGMENT

In this case, the accused, John Wayne Tonubbee, (*plead guilty after his constitutional rights were explained and waived*) having been regularly tried and a verdict of guilty of the crime of TWO COUNTS OF FIRST DEGREE MURDER found against him, and the law and evidence being in favor of said verdict. and the accused when called upon for sentence having assigned no valid reason why sentence should not be pronounced against him, and the court having been judicially ascertained that

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***Attachment A Transcript of Boykin Warning to be filed by criminal court reporter 6 weeks from date with Judge who will file herein.

***Case is not complete unless Boykin filed herein.

***Sheriff is to attach jail report.

***Copy served on Defendant

the accused is Thirty-eight (38) years of age, being born on July 18, 1942;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

The accused, John Wayne Tonubbee, be and is hereby condemned to be committed to the Department of Corrections for imprisonment at hard labor for the term of Life without benefit of parole, probation, or suspension of sentence in accordance with the Jury recommendation. (Concurrent) Let defendant be given credit toward service of his sentence for the time spent in actual custody prior to the imposition of sentence, and that is from (see attached) to May 19, 1981.

JUDGMENT RENDERED AND SIGNED IN OPEN COURT at Hahnville, Louisiana, this 19th day of May, 1981.

RUCHE J. MARINO, DISTRICT JUDGE

APPENDIX "C"

RULING ON MOTION TO SUPPRESS

Volume 4, p. 129 April 23, 1981

THE COURT:

On the motion that is filed, Mr. Bradley, the Motion to Suppress of which you have requested and I think I eluded to this with some of the reason I have with some of the exceptions things that, of course, I don't know the particular answers at this particular time about the warrant of arrest and the search warrant and the warrant of arrest at the home, that is another issue that just came forward. I don't feel that it is applicable here, but we can argue this at a later point in time and in order to proceed and give you a situation that I have, as I look at this is that at the particular time, of course, I want to explain myself, on the Motion that we have hear during the preliminary examination certain things came out and, of course, during the preliminary examination this court had found no probable cause in this particular thing on the aspects of that particular type of situation under the Code of Criminal Procedures. However, under the situation that I find with the things that were confronted with the police and there is a question of whether an arrest was taken place at the particular time that he was picked up or whether it took place at the courthouse. I find that in reference to the pictures is that if the picture under the evidence was shown, that as he came to the courthouse that he was arrested. Then, of course, we asked the question of the police officer

if initial testimony had been taken or just the evidence gathered from the ride from Bayou Gauche to the courthouse, one aspect was, of course, was the statement of the defendant, saying "If I ever get out of this I won't drink anymore." Of course, the question resolves itself —the statement resolves itself as to what he meant by this. What is meant by this is going out and being out with the girl and some type of trouble developed and he would never drink. Or does the statement refer to so type of inculpability to the crime he was charged with. So in reference to additional evidence, I think that was additional evidence, as to whether or not the arrest took place over there or whether or not the arrest took place over here, we see that the rights were given and also the testimony was to the effect that something had taken place and the police at that particular time were not certain what type of crime it was, whether or not it was a first degree murder case of a negligent homicide or whatever it may be. And during the investigation of the case evidence was brought to their attention in respect to the situation that developed over the situation that Mr. Tonubbee was last scene with this particular party and that also was the testimony of the red truck through the testimony that was incorporated by reference and also by the red truck and all that testimony indicates that a reasonable person would have to ask Mr. Tonubbee well what is taking place. Of course, again, as I state perhaps I would not have done it that particular way of going perhaps I would have done it a different way. It is not the way I would have done it as a matter of procedure I think that the procedure was in going over there that under the person that they thought, assumed owned the house and being told that he owned the house, and the question is and it is further compounded is that again we have a house that is

evidently owned by one person with another in it and with another inside that one. The question is is that in their authority to get inside this house he permitted someone to get in. Definitely, the first two people gave permission in most of the testimony that we have. And, of course, Mr. Tonubbee was in a room that he was sleeping in when he was awaken. And when he was awaken and taken to the Sheriff's Office then the question evolves whether or not permission was given. I find that—(in audible)—with the jurisprudence would indicate that permission was given to enter the residence. The person was awaken and the person was then asked to get dressed. Now, there is some testimony to the effect that perhaps the police said put these clothes on and some testimony is that he just picked the nearest clothes that he had there. And, of course, common sense would dictate in a situation such as this is that many times in an emergency type situation and I am sure if you were sitting home and you came in one night and you put your clothes on the side of the bed and a fire broke out I do not think that you would take the time to go to the locker and get a new set of clothes. I think that common sense would dictate that you grab those clothes and I feel that a reasonable assumption could be made of that particular clothes. And, of course, again the testimony at this time does not indicate that anyone new exactly what specific clothes that were involved. The question is is that he was taken to the police headquarters. Now, again, we are taken over here and we are taken to a line up and again a line up would not be the way that I would do it. A line up would be—the way I would do it is to have the line up not with a picture line up but have a line up with people. Have the necessary people, look alikes, at least eight of them in a line up procedure and identification taking a proces verbal on all the

other things that go with—(in audible). Now that would be the best situation to do it. However, knowing that the jail population is not always such that you are going to find eight look alikes is kind of difficult sometimes to get into this type of situation and the next thing that the Supreme Court of the jurisprudence under Gilbert—(in audible)—etc. and all of those cases with line ups indicates that you can have a picture line up. And the key word under the picture line up is that there can be no suggestion as to who did it. And, of course, the testimony of the person in the form of Mr. Templet indicates that he picked out the particular person and that the person looked like the guy but he was not certain. So actually, I find no testimony showing that it was inductive or that it was produced by the police that this was the guy and that looking at the pictures, again, I would state that perhaps the best way to secure this type picture would be to have a picture that would be free and clear of any marks on it, free and clear of any marks on the back with the exception of maybe a pen, number 1, 2, 3, up to 8 of the pictures that you would have and also the fact that any picture that may have been taken recently been showing that it wasn't taken recently, etc. All of the pictures on identification look at them, looking at a brief composite of all the pictures at the same time, of course, the clothes do not look alike. Very seldom will everybody have the same type of clothes in the sense of color. But the clothes are alike in the sense that they were all American clothes. All of the pictures look alike with the exception of one that has a fat face and the other faces look to the extent that those people could be look alikes. Also, each of the pictures indicate that they have type of moustache which sort of are thicker and toward the middle of the nose and tapper off around the end. Some of the pictures indicate the

people have long hair but I think a brief looking at them is that sometime it is very difficult to get them all. I look at the pictures and I can see that there would be no suggestion by looking at the pictures. Of course, I know Mr. Tonubbee by looking at him and when I look at the pictures I can pick him out because I've seen him. But looking at the thing as a whole for the Motion that you filed and also the fact of the clothes and what we have, of course, the clothes came later and so I did not go in to too much detail on that because, of course, the testimony from the other witnesses indicate that after the arrest the clothes were picked up and those clothes were examined or whatever was done with them and follow through and whatever is going to be done with them. Now, the security of the pictures is that in the past we have had problems with the pictures being taken from a mass of pictures in the form of 60 to 100 to a tray and those same pictures that have been picked out placed back. And it has been suggested to the Sheriff's Office previously by this Court by this Judge that perhaps that should not be the proper thing to do. That what should be done is that individual pictures should be given and those individual pictures should not be used for any other cases. The testimony indicates that the pictures were kept with the situation perhaps with another report and there is other previous testimony that has taken place in here that this court observes the testimony that the pictures were placed inside of a desk drawer. Whichever way it is, is that the court finds that the pictures were secure. That there has been no tampering with the pictures. However, I would suggest strong to the Sheriff's Office that some kind of better procedure would be is to take these pictures and if you are going to have eight pictures, that you would take those eight pictures and once you have finished with those eight pictures you

write up a report on those eight pictures, go put the report around the pictures and seal them for additional use by the DA or the Attorney General at a later time so that you can have the original pictures and not have all of those marks and those things. So looking at your whole motion to where you indicate that a constitutional rights were violated is that there was an illegal arrest and—(in audibile)—and that this person was arrested at the time of—at his residence etc. for the reasons I have given, Mr. Bradley, in all of those things that were cited and looking at the facts of the situation as far as the Motion to Suppress before me as a Judge, I am going to have to say that the Motion to Suppress is going to be denied and we will move forward. Of course, in moving forward that will mean that we will have to produce the same evidence before the jury. The only exception that those things are going to have be cut out will the Motion to Suppress before the jury, of course, will not entail any type of hearsay evidence. Secondly, again, we have to be real careful when we talk about statements because there was some testimony to the effect that additional statements were said or statements made by the defendant other than the 768 statement that was given, and of course, they don't mean anything. It wasn't any inculpitory type of thing and I think we ought to make this clear so we don't cause any confusion to the jury. I am going to ask that you know we try to present this thing to the jury in a logical fashion or some kind of way so we can keep this thing up. So, actually for the purposes of what I just said the Motion to Suppress is denied.

MR. BRADLEY:

Yes, your honor, and I will object to to your ruling and asked that it be so noted.

THE COURT:

Okay.

Okay, anything else.

No. 82-978

In The
Supreme Court of the United States

OCTOBER TERM, 1982

JOHN WAYNE TONUBBEE,

Petitioner,

VERSUS

STATE OF LOUISIANA

Respondent.

Petition for Writ of Certiorari to the Supreme Court of United States

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petition for Writ of Certiorari to the Supreme Court of United States

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of Louisiana opposes the petition for writ of certiorari filed on behalf of John Wayne Tonubbee to review the judgment of the Supreme Court of Louisiana affirming his conviction under LSA R.S. 14:30 for first degree murder.

JURISDICTION

The State of Louisiana hereby adopts the statement of jurisdiction contained in Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The State of Louisiana hereby adopts the statement

of constitutional provisions involved contained in Petition for Writ of Certiorari..

STATEMENT OF THE CASE

The facts of the case indicate that Pauline Odom and Leo Dufrene were killed late at night on April 19, 1980 after being struck by a GMC pickup truck on a Louisiana highway. During the investigation of the case, but prior to officers questioning Tonubbee, police officers had learned: (1) Tonubbee, AKA Wayne Thompson, had been seen driving a truck on April 19, 1980; (2) Tonubbee had been observed drinking and arguing with Odom, threatening her, and leaving a bar with her around 11 P.M. on April 19, 1980; (3) Tonubbee fit the description provided by Paul Templet, who had been struck from behind while attending to Pauline Odom on the side of the highway around 11:30 P.M., just prior to Odom's death.

Early in the morning of April 20, 1980, police officers arrived at a camp where it had been learned Tonubbee (AKA Thompson) was living with a man named Stapelton. Police knew Stapelton owned a truck, and learned from Stapelton that Tonubbee had used the truck on April 19, 1980, but Stapelton had not seen the truck after Tonubbee returned home. After speaking with Stapelton outside the residence, officers and Stapelton entered the house, spoke to Tonubbee, after which they brought Tonubbee to the police station for questioning.

John Wayne Tonubbee was arrested for murder and was subsequently convicted by a unanimous jury of two counts of first degree murder (LSA-R.S. 14:30(3)). He

was sentenced to life imprisonment after motion for new trial was denied by the trial court. An appeal was taken to the Louisiana Supreme Court, which court affirmed the conviction. Tonubbee is presently petitioning to this Honorable Court for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

Petitioner's initial reason suggested for granting writ of certiorari is that the police illegally gained entry into the house where Tonubbee had been living, through coercion of Stapelton. Petitioner thus arguing the entry was not consensual. The State of Louisiana disagrees with this position.

The evidence presented during the hearing on the motion to supress indicates police used no coercion or threats in order to gain entrance into the camp. The officers knew Tonubbee (AKA Thompson) lived at the camp with Stapelton. They knew Tonubbee had been driving a truck on April 19, 1980, they knew victims had been killed by a GMC truck, and they were aware that Stapelton owned a truck. Conversation with Stapelton confirmed he had loaned the truck to Tonubbee the previous day, but it had not been returned although Tonubbee was in the residence sleeping.

Although the plainclothes officers did possess weapons, there was no testimony these weapons were pointed at Stapelton or in any way used to threaten or intimidate Stapelton into allowing the officers entry into the camp. No one had been arrested at the time, and no one had been threatened with arrest if the officers were not allowed entry into the house. The officers did not imply in

any way that a search warrant or arrest warrant had been secured by them as an attempt to gain entry into the house. Stapelton was allowed to enter the camp by himself to get his gun from the camp, which gun he put in his pocket. The officers did not even take custody of this weapon. Stapelton also entered the residence with the officers to wake up Tonubbee.

Petitioner argues this case should be governed by the ruling of *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371 (1980). However, in that decision this Honorable Court held that case did not involve an entry to a house made with consent. "Finally, in both cases we are dealing with entries into homes made without the consent of any occupant." *Payton*, supra, at page 1378. As the state respectfully argues the situation is one of consent by a co-occupant, attention is called to those cases providing guidelines in determining when consent is deemed to have been voluntarily given. In *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973) at page 2048, it was held ". . . the question whether a consent to a search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances."

The state would readily concede that Stapelton was not advised by officers that he had a right to refuse entry to the officers, nor was it affirmatively shown that Stapelton knew he could refuse entry. As this Honorable Court has continuously ruled these are not prerequisites for a "valid consent search," and no further discussion of this issue will be presented.

The issue from petitioner's viewpoint appears to be one of "implied" threats. Petitioner would appear to argue that because there were three armed officers at the house, any consent by Stapelton would be coerced. Such has not been held to be the case, however. In *Schneckloth*, supra, the subjects were also confronted with three armed officers, and this court found no indication of duress or intimidation which would vitiate the consent. "There's no reason to believe, under circumstances such as are present here, that the response . . . is presumptively coerced and there is, therefore, no reason to reject the traditional test for determining the voluntariness of a person's response." *Schneckloth*, supra.

As in *Schneckloth*, the instant case exhibits no evidence of coercion "either from the nature of the police questions or the environment in which it took place."

The State would also respectfully call the Court's attention to *Coolidge v. New Hampshire*, 403 U.S. 443, 71 S.Ct. 2022 (1971).

In that case police had a subject at the police station for questioning for murder. Two officers went to the subject's residence and spoke to the subject's wife, asking questions concerning whether there were any guns in the house. After receiving the response "yes, I'll go get them" officers replied "we will come with you". Petitioner in that case made the argument that consent was not voluntary because of "demand" by the officers. But the court held "In a situation like the one before us, there no doubt always exists forces pushing the spouse to cooperate with police officers. . . But no part of pol-

icy underlying the Fourth & Fourteenth Amendments is to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." This same statement can be applied to the situation now before the court.

Petitioner also argues Writ of Certiorari should be granted because under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979) the State of Louisiana presented insufficient evidence to support a first degree murder conviction under Louisiana law.

Respondent would initially caution this Honorable that although in his petition, petitioner states "the prosecution contended that photographs of the victims showed specific intent" to kill or inflict great bodily harm on more than one person, these photographs were not the sole evidence of intent presented to the jury. Petitioner completely ignores testimony of Paul Templet that while attending to Odom on the side of the highway, he was intentionally struck on the head with a hard object by someone who matched Tonubbee's description. This intentionally inflicted serious injury was shown to have occurred immediately before the deaths of Odom and Dufrene, and constituted part of the crime of first degree murder.

See appendix A in Petition for Writ of Certiorari, *State v. Tonnubbee*, 420 So.2d 126 (La. 82).

The ultimate issue in this review is whether the constitutional due process standard regarding sufficiency of evidence professed in *Jackson v. Virginia*, supra, adopted by this Court has been met.

That question in context with this case has been

stated as follows: Whether after construing the evidence in the light most favorable to the prosecution, any rational jury could have found the essential elements of first degree murder beyond a reasonable doubt.

"Considering the evidence in the light most favorable to the state", necessarily means that where there exist conflicts in testimony or inferences to be drawn from evidence, the reviewing court must presume that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. This according to *Jackson* is important in order to preserve the fact finder's role as weigher of the evidence in our system of justice. (*Jackson* at pp. 2789, 2793).

Some of these conflicts which should be presumed resolved in the state's favor and against the defendant are as follows:

(1) Pauline Odom and defendant were together, drinking in Blondy's lounge the night she was killed.
(2) Pauline Odom, somewhat intoxicated, did not want to leave the lounge, but did leave after being threatened by defendant—"Either you come with me or I'm gonna knock your butt down and take you out."
(3) Pauline Odom and defendant left the lounge together near 11:00 p.m. on the night she was killed.
(4) Paul Templet was struck on the head by defendant immediately preceding the murder of Odom and Dufrene.
(5) Defendant was observed driving a truck belonging to Ham Stapelton, as late as 6:00 p.m. on the day of the offense, contrary to defendant's testimony.
(6) The truck belonging to Stapelton was the "murder weapon."
(7) Defendant, when being transported to the

sheriff's office, made the statement "If I ever get out of this I'll never drink again."

The defendant's position is in effect that anything is *possible*, but under *Jackson* every possible explanation need not be excluded and these other possibilities, i.e., someone else as perpetrator or accident, are not reasonable explanations of what occurred based on the circumstances and facts presented to the jury.

In the instant case, the jury chose to believe and reasonably so, that the death dealing "weapon" was being driven by defendant. There is evidence in the testimony of Paul Templet that a vehicle was heard to stop a distance from him then a man, about 5'7", 170 lbs., with dark hair and mustache, and blue or black clothes struck him on the head as he was holding Pauline Odom in his lap. Thus it can be assumed, this individual intended to inflict great bodily harm on Paul Templet and there is sufficient evidence for the jury to reasonably conclude this person was defendant. Since a vehicle belonging to defendant's friend was then almost immediately used to strike Pauline Odom and Leo Dufrene, after Paul Templet was already struck, there is also evidence which can reasonably indicate a specific intent to kill or inflict great bodily harm on more than one person.

In conclusion, under the standard set forth in *Jackson* and deferring to the jury's resolution of conflicting inferences in favor of the State, it can be said that any rational fact finder including this jury *could* have found all elements of this crime proved beyond a reasonable doubt.

CONCLUSION

Wherefore, in light of the aforementioned arguments concerning the errors alleged by petitioner to have occurred in the instant case, it is the position of the State of Louisiana that no error was committed which would mandate a reversal of the murder conviction of John Wayne Tonubbee. The State of Louisiana urges the Court to deny the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of Opposition to Petition for Writ of Certiorari have been served upon counsel for petitioner, by placing three copies thereof in the U.S. Mail, first class postage prepaid, addressed to Victor E. Bradley, Jr., P. O. Drawer B, 27 Apple Street, Norco, Louisiana 70079.

Baton Rouge, Louisiana
This 25th day of March, 1983.

B-7618,3-83,50